No. 2850

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FIREMAN'S FUND INSURANCE COMPANY (a corporation),

Appellant,

vs.

CANADIAN PACIFIC RAILWAY COMPANY (a corporation of the Dominion of Canada), owner of the Steamship "PRINCESS VICTORIA," her engines, etc., PACIFIC ALASKA NAVIGATION COMPANY (a corporation), and ALASKA PACIFIC STEAMSHIP COMPANY (a corporation), claimants,

Appellees.

In the Matter of the Petition of the CANADIAN PACIFIC RAILWAY COMPANY (a corporation of the Dominion of Canada), owner of the Steamship "PRINCESS VICTORIA," for Limitation of Liability.

APPELLANT'S PETITION FOR A REHEARING.

IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
BALLINGER, BATTLE, HULBERT & SHORTS,
Merchants Exchange Building, San Francisco,
Proctors for Appellant and Petitioner.

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APPELLANT'S PETITION FOR A REHEARING.

To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Fireman's Fund Insurance Company, appellant herein, respectfully requests a rehearing in this cause because

the court has disposed of the appeal upon an erroneous assumption of fact, without apparently considering the matter on the merits.

The opinion of the court disposes of the appeal upon two grounds:

(1) Because in this court appellant contended for the allowance of interest from the date of the collision, whereas in the lower court interest was only claimed from the date of payment by appellant to its policy holders;

(2) Because payment by appellant to the cargo owners was made on June 12, 1916, from which date the lower court allowed interest.

(1.)

It is true that in this court we contended for the allowance of interest from the date of the collision, and that in the lower court interest was claimed only from the time of payment by appellant to the cargo owners, but that difference in time is so short that it becomes immaterial, and rather than further consider it we are willing to waive interest from the time of the collision to the date of actual payment by appellant to the cargo owners.

(2.)

This court, as its second reason for affirming the decree of the lower court, says:

> "When the appellant paid its insured the amounts for which it was liable, and thus became subrogated to the rights of the insured, is nowhere made to appear in the record; *but surely it could*

> *not have been prior to the time when its insured's loss was ascertained and fixed, which was July 12, 1916.''* (Italics ours.)

The court in that statement has fallen into error. Appellant had paid the cargo owners the amounts due each of them very shortly after the collision. The loss occurred on August 26, 1914, and appellant immediately commenced paying the losses of the cargo owners which it had insured. Most of these payments had been made by appellant within three weeks after the loss of the vessel and her cargo. All of the cargo owners which appellant had insured were paid by appellant within thirty days after the collision. These facts were and are known to appellee. All the cancelled checks, data and proofs necessary to convince it of the correctness of appellant's interests were submitted to appellee's proctors, and after careful consideration were agreed to as correct. This data and proof conclusively show when payments by appellant were made to the cargo owners. They do and will show that appellant has been deprived of the use of its money from approximately thirty days after the collision until the time appellee paid the principal sum admittedly due. Thus, it becomes apparent that from the latter part of September, 1914, until June 12, 1916, appellant, without any just cause, has been deprived of the use of its money and has been deprived of interest upon it for that period of time. Likewise it is apparent that appellee during the whole of this period (twenty-one months) has had the use and enjoyment of appellant's money, without paying any consideration therefor.

It is true that the record in this court does not disclose the exact day upon which the various cargo owners were paid by appellant, but certainly this court will not permit an immaterial omission of that kind to work a miscarriage of justice. Would not the more fair and equitable course for this court to take be to reverse the decree disallowing appellant interest for twenty-one months, with directions to allow appellant interest from the time it actually paid the various cargo owners whom it had insured? Then the dates upon which the cargo owners were paid, which information is in the hands of appellee, could be agreed to, and the universal rule in such cases—an allowance of interest upon the sums admittedly due innocent parties to a collision—would be applied. Certainly this court sitting in admiralty is not bound by any hard and fast rules of the technical common law. In hearing admiralty appeals, it is constantly striving to do equity between parties litigant, for it so stated in *California-Atlantic S. S. Co. v. Central Door & Lumber Co.,* 206 Fed. 5-7, in applying the settled rule,

> "in admiralty the court will determine cases upon equitable principles".

The answer filed by appellant in the court below (Apostles, p. 21), clearly negatives the court's finding that appellant paid the cargo owners, for the losses sustained by them, on June 12, 1916. It sets forth the names of the cargo owners insured by appellant and the amount paid to each of them. In that verified answer, prepared in 1914, it was, among other things, alleged:

> "* * * that by reason of said loss of said cargo it was compelled to pay, *and has paid,* the owners thereof, the full value of the same, * * *"

Thus the record does show that payments by appellant were made upon dates prior to the one which this court erroneously assumed they were made.

Furthermore, the parties expressly agreed to a hearing by this court, of the propriety of the action of Judge Neterer, on the record now on file (Apostles, p. 42). Certainly, the many canceled checks, vouchers and receipts showing the respective dates of payment should not be required in this court. They would only encumber the record. The answer filed in January, 1915, alleged that the cargo owners *had then been paid.* Furthermore, the appellee had definite knowledge of the actual dates of payment. None of that information, however, was material to a consideration by this court of the propriety of the action of the lower court.

The small record in this case contains all matters necessary to a proper determination of the question presented. No evidence is to be reviewed, no facts are to be considered. The pleadings alone might have been brought to this court. There are many parties interested and no good purpose would be served in making the record cumbersome by the addition of further pleadings or unnecessary matters. Nothing was before the lower court upon this question of interest that is not before this court. As the stipulation of the parties (Apostles, p. 32), indicates, the parties agreed to the amounts paid by each of the

underwriters, but there was no agreement as to an allowance of interest on those sums. Appellant and the other underwriters contended for the allowance of interest from the dates upon which payment by them to the cargo owners had been made, but appellee would not consent to its allowance. The matter was, therefore, reserved for the consideration of the court. After the matter had been presented to Judge Neterer, sitting in the lower court, he, without any apparent reason, arbitrarily disallowed appellant and the other underwriters interest from any date prior to June 12, 1916. By such action the lower court did not allow the measure of damage universally applied in similar cases. Appellant's right against appellee is for a *restitutio in integrum* and it should be placed in the same situation as it was in on the respective dates upon which it parted with the money on account of the collision for which appellee was responsible. The "just measure" in such cases, says the Supreme Court, referring to damages to a vessel and her cargo,

> "has been deemed to be their actual value, *together with interest upon the amount*, from the time of the trespass".
>
> *The Apollon,* 9 Wheaton 361, 6 L. ed. 111.

We feel confident that this court does not desire to depart from the rule uniformly applied in such cases. If there be merit in the contentions presented in our brief on file herein and to which we now, without again repeating them, refer the court, we submit that in all fairness this court should allow interest from the dates

upon which payment by appellant to the cargo owners was made. The dates upon which these sums were paid are not, as assumed by the court, on June 12, 1916, but twenty-one months previously thereto. It would, therefore, be a very simple matter to direct the lower court to allow interest upon the amount stipulated to as paid by appellant to the cargo owners from the dates upon which the payments were actually made. If appellant is entitled to interest, we most respectfully submit that it will be much more equitable to so direct the lower court than it will be to permit the present opinion of the court to stand, and particularly so in view of the fact that the opinion does not discuss the matter on the merits, but on the contrary disposes of the appeal upon an erroneous assumption of fact.

In this petition we have refrained from citing the authorities presented in our brief, but as they apparently have not been considered by the court, we most respectfully submit that our brief be again considered in connection with this petition.

Dated, San Francisco,
June 12, 1917.

Respectfully submitted,

IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
BALLINGER, BATTLE, HULBERT & SHORTS,
Proctors for Appellant
and Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact, and that said petition is not interposed for delay.

IRA A. CAMPBELL,
Of Counsel for Appellant and Petitioner.